

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Closed Captioning and
Video Description

of Video Programming

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MM Docket No.
95-176

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

REPLY

REPLY OF THE AMERICAN FOUNDATION FOR THE BLIND TO COMMENTS ON THE
NOTICE OF INQUIRY REGARDING CLOSED CAPTIONING AND VIDEO
DESCRIPTION

To the Commission:

The American Foundation for the Blind (AFB) is pleased for the opportunity to reply in the above-captioned matter. Our additional comments are in response to comments concerning potential copyright infringement and First Amendment issues raised by commenters in their initial filings in this matter.

Some commenters indicated that they had reservations about the impact of a requirement of video description service (VDS) on their intellectual property rights. Moreover, we note that these commenters have, in the past and in other contexts, raised objections to the VDS requirement on the grounds that it is violative of the First Amendment to the Constitution. In the course of this reply, we hope to assure the Commission that it may proceed with rulemaking in this area without jeopardizing First Amendment liberties or infringing upon copyright.

A. A VDS Requirement Would Not Conflict With Copyright Law.

A few commenters expressed their concern that a requirement to provide VDS would constitute a limitation on their exclusive right, granted by the Copyright Act, to produce "derivative works." The description of a particular program involves a series of creative and innovative choices to provide as much accurate and complete information as possible within the narrow gaps in program dialogue. It is natural and appropriate that such descriptions should be given the protection offered by the copyright statute.

However, the commenters seem to be concerned that the VDS requirement will enable third parties to obtain copyright interests in those programs which have not been described. Putting it another way, the commenters are concerned that the VDS requirement will allow others to share in their copyright ownership when they refuse to comply with the requirement.

This concern, we believe, is totally unfounded. The VDS requirement will not be so broadly drawn or liberally construed as to allow any entity to cure a program's lack of video description by violating the rights of the copyright owner.

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There are a number of restrictions and guidelines with which program producers must adhere. The most obvious of such rules involves the use of offensive language or the showing of sensitive material during times when children are likely to be in the audience. A VDS requirement will be merely another rule by which producers must play if they wish to air or distribute their programs. Refusing to comply with the VDS requirement may result in less profit for producers when their programs are not permitted to be carried or are otherwise restricted. However, copyright owners will remain free to exercise their right to produce derivative works (i.e. descriptions) and to avail themselves of the benefits of complying with the law.

B. The Requirement Of Video Description Service (VDS) Would Not Unconstitutionally Compel Speech.

Some opponents of a video description requirement argue that such a requirement would constitute "compelled speech" because it would require those affected to add verbal messages concerning on-screen action to program content and thereby infringe upon editorial discretion. However, in developing programming and producing motion pictures, broadcasters and movie producers have made choices about plot, theme, focus, tone, dialog, stage direction and other elements which, in combination, total the "speech" they wish to convey.

Description of those elements not accessible to blind or visually impaired persons, mandated by a VDS requirement, originates with the producer of the programming who has already expressed the message to the rest of the audience. Since the government will not be dictating the script of descriptions, producers retain complete editorial discretion as to the way in which they present their message to blind audiences. Thus, a VDS requirement allows the blind to more completely participate as programming "viewers" by enabling them to be more effective listeners.

The Supreme Court's treatment of the "compelled speech" issue further demonstrates the constitutionality of a VDS requirement. As sketched above, mandating VDS does not require broadcast and movie producers to "advocate" views or themes with which they disagree. Thus, the VDS requirement is wholly unlike the speech compelled by the requirement, struck down by the Court, that school children pledge allegiance to the flag in direct contravention of their religious beliefs. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). Nor is the requirement even slightly akin to the insistence of one state held unconstitutional by the Court, that motorists could not block out the motto "Live free or die," appearing on their license plates despite disagreement with the sentiment. Wooley v. Maynard, 430 U.S. 705 (1977). The Court has held that an incorporated public utility company cannot be compelled to place in its billing envelopes a third party's newsletter containing views which might be in disagreement with those of the utility. Pacific Gas & Electric v. Public Utilities Commission, 475 U.S. 1 (1986).

These "compelled speech" cases pertain to those situations where the government attempts to force speakers to convey messages with which they disagree or which they would rather not convey at all. Observe that a VDS requirement, although not really a requirement to articulate a point of view, does not demand that a producer "say" anything that has not already been said through the other elements of the program. Moreover, the cases concern governmental involvement with the content of the speech to be compelled. Interestingly, the Court has held that a state is not prohibited from requiring a large privately owned shopping center, open to the public, to permit persons to exercise their speech rights on shopping center property, as long as the particular message is not dictated by the state. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). Thus, the Court's distaste for compelled speech is tempered by the value of viewpoint diversity, even as against private property, where the state is not dictating the message

and when the general public has access to the speakers. It is clear, then, that the VDS requirement does not unconstitutionally compel speech.

C. The VDS Requirement Is A Content-Neutral Regulation Of Speech.

The basic question in determining the content neutrality of regulations is whether the government has adopted a regulation of speech because of disagreement with the message that the speech conveys; the government's purpose is the controlling consideration. Clark v. Community for Creative Non-Violence, 486 U.S. 288, 295 (1984). Regulations that serve purposes unrelated to the content of expression are considered by the Court to be neutral, even if the regulations result in incidental effects on some speakers or messages but not others. Renton v. Playtime Theatres Inc., 475 U.S. 41, 47-48 (1986). The restrictions will be upheld as content-neutral so long as they are "justified without reference to the content of the regulated speech." Clark, 486 U.S. at 293. Based upon these guiding principles, the Court overturned a municipal ordinance which banned the placement on public property of news racks purveying commercial publications while permitting non-commercial ones; the city could advance no purpose for the restriction that was not grounded in the content of the publications. City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1516-17 (1993). The Court has held that a law may not forbid only those signs within 500 feet of a foreign embassy that are critical of the foreign government; all signs or no signs must be forbidden. Boos v. Barry, 485 U.S. 312 (1988). It is a failure of common sense and a misreading of the law which results in the erroneous suggestion that the proposed VDS requirement is a content-based regulation of speech like the restrictions struck down in the cases above. The requirement would apply irrespective of artistic, literary, dramatic, historical, comedic or informative value. A VDS requirement would not exempt a class of "speakers" based upon any evaluation or characterization of the programming offered. Most importantly, the requirement is not an attempt to regulate speech with which the government disagrees.

A VDS requirement, then, is very much like the regulation upheld in Ward v. Rock Against Racism, 491 U.S. 781 (1989). In order to prevent excessive noise levels at concerts, city guidelines required that the city's sound technician, using the city's sound equipment, would be responsible for the sound amplification and mix for concerts. Against the claims of some performers that the guidelines amounted to a content-based regulation of their speech, the Court found that the city's concern with sound quality extended only to the "clearly content-neutral goals of insuring adequate sound amplification and avoiding the volume problems associated with inadequate sound mix." Ward, 491 U.S. at 792-93.

Moreover, the Court noted that the city had a substantial interest in making sure that the sound mix was sufficient to enable as much of the audience as possible to enjoy the concerts, and that such quality concerns had nothing to do with the content of the performers' speech. Id. The performers' First Amendment rights were not violated because the city's guidelines pertained to overall quality and the interest in clear sound for the entire audience and did not threaten the performers' rights to "speak altogether." Id. at 794. The VDS requirement has as its singular purpose the opening up of the information age to persons with disabilities, enabling the entire audience to access, learn from, and enjoy programming, and leaves artistic judgment by producers intact.

D. The VDS Requirement Is A Valid Time, Place or Manner Regulation.

If a regulation is found not to be content-based, then courts will view it as a restraint on the conduct associated with speaking or as a governmental attempt to establish conditions under which expressive freedoms can be exercised. Such time, place or manner restrictions are valid if they "are justified without reference to the content of the regulated speech, [if] they are narrowly tailored to serve a significant governmental interest, and [if] they leave open ample alternative channels for communication of the information." Clark v. Community for Creative Non-Violence, 468 U.S. at 293; See Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748, 771 (1976)). Moreover, the regulation need not be the least restrictive means of accomplishing the governmental interest. United States v. Albertini, 472 U.S. 675, 689 (1985); Ward, *supra*, at 797.

Although a VDS requirement is potentially applicable to a wide variety of program producers and carriers, it only requires that programming be accompanied by a signal, which is accessible only to those who actively seek to receive it and does not at all interfere with ordinary program reception, which will carry descriptions. The requirement is narrowly drawn to serve the government's interest in wide diversity of viewpoint and the judicially recognized substantial public interest in enabling persons with disabilities to lead full and independent lives. See generally, Community Television of S. Cal. v. Gottfried, 459 U.S. 498 (1983).

In terms of the VDS requirement, there are literally alternative channels of communication open to producers. Even if it were conceded for purposes of argument that such a requirement amounted to "compelled speech," an overwhelmingly substantial portion of the audience would receive an "untainted" program, and producers would, in any event, retain the editorial discretion to convey their messages as they chose. Therefore, the VDS requirement would be upheld as a valid time, place or manner regulation of speech.

We thank the Commission for considering these additional views made in response to comments already included in the record. Should you have any question concerning the issues discussed, please do not hesitate to contact me.

Respectfully submitted,

Scott Marshall
Vice President, Governmental Relations
American Foundation for the Blind
Governmental Relations Group
1615 M Street, N.W., Suite 250
Washington, DC 20036
202-457-1487

cc: Linda Dubroof
Operations Deputy Chief
Network Services Division